United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

B
P/S

75-1413

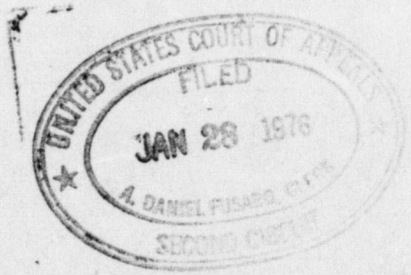
To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- JERRY WAYNE NEAL, Appellant.	Docket No. 75-1413

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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D. C. Form No. 100
CRIMINAL DOCKET

75CR 500 COSTANTINO, J.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES vs. JERRY WAYNE NEAL	For U. S.: GOULD For Defendant:

Did engage in business of dealing in fire-arms which were not registered

ABSTRACT OF COSTS	AMOUNT		CASH RECEIVED AND DISBURSED				
			DATE	NAME	RECEIVED		DISB
Fine,			11/12/75	Notice of Appeal (no fee)			
Clerk,							
Marshal,							
Attorney,							
Commissioner's Court,							
Witnesses,							

DATE	PROCEEDINGS
6-19-75	Before JUDD, J - Indictment filed
7/1/75	Before COSTANTINO,J.- Case called- Deft present without counsel-def arraigned and the Court enters a plea of not guilty- trial set for at 10:00 A.M.
9-15-75	Before COSTANTINO J - case called & adjd to Oct. 14,1975 for trial
10/14/75	Before COSTANTINO,J.- Case called- Deft and counsel present- Trial and begun--jurors selected and sworn-trial contd to 10/16/75 at 10
10-16-75	Before COSTANTINO J - case called - deft & atty S.Chrein present - trial resumed - Motion for judgment of acquittal - denied - trial contd to Oct. 17, 1975 at 11:00 AM.
10-17-75	Before COSTANTINO J - case called - deft & atty present - trial

75CR 500

DATE	PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFEND
10/20/75	Before COSTANTINO,J.- Case called- Deft and counsel present- Trial r both sides rest-deft renews motion for judgment of acquittal-motion jury retires to deliberate-jury returns and renders a verdict of gi counts 2 and 3 jury polled- jury discharged-sentence adjd without da bail contd		
10/20/75	By COSTANTINO,J.- Order of sustenance filed		
10-23-75	Voucher for Expert Services filed.		
12-12-75	Before COSTANTINO J - Case called - deft & atty S.Chrein of Legal Aid present - deft sentenced to imprisonment for a period of 3 years to run concurrently on each of counts 1 and 2 - clerk to prepare Notice of Appeal without fee. Bail contd on the condition that deft report to AUSA Gould once a week.		
12-12-75	Judgment & Commitment filed - certified copies to Marshal		
12-12-75	Notice of Appeal filed (no fee)		
12-12-75	Docket entries and duplicate of Notice of Appeal mailed to the Court of Appeals.		
12/22/75	Certified copy of Order recd and filed that the recrod be docketed on or before 12/29/75		
12/29/75	Stenographers Transcript dated 10/16/75 filed		
12/29/75	Record on appeal certified and handed to Joan Gill for delivery to c		

ATTEST: CLERK

12/29/75

[signature]

RJD:DSG:sd
F. #751568

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

75CR 500

- X

UNITED STATES OF AMERICA

- against -

JERRY WAYNE NEAL,

Defendant.

- - - - - - - - - - - - - - - - - - - -

Cr. No.
(T. 18, U.S.C., §922(a)(1), and 924(a)
T. 26, U.S.C., §5861(d)(h) and 5871)

THE GRAND JURY CHARGES:

COUNT ONE

On or about and between the 13th day of February and the 4th day of April within the Eastern District of New York, the defendant JERRY WAYNE NEAL not at the time being a licenced importer, manufacturer or dealer of firearms or ammunition knowingly and wilfully did engage in the business of dealing in firearms and ammunition. (Title 18, United States Code, §922(a)(1) and Title 18, United States Code, §924(a)).

COUNT TWO

On or about the 28th day of February 1975 within the Eastern District of New York, the defendant JERRY WAYNE NEAL

did wilfully, knowingly and unlawfully possess a firearm as defined in Title 26, United States Code, §5845(a), to wit, a sawed off shotgun, which firearm was not registered to the defendant JERRY WAYNE NEAL in the National Firearms Registration and Transfer Record. (Title 26, United States Code, Section 5861(d) and 5871).

COUNT THREE

On or about the 28th day of February 1975 within the Eastern District of New York, the defendant JERRY WAYNE NEAL did wilfully, knowingly and unlawfully possess a firearm as defined in Title 26, United States Code, §5845(a), to wit, a

(1)

sawed off shotgun which firearm had the serial number required by Title 26, United States §5842(a) obliterated. (Title 26, United States Code, §5861(h) and Title 18, United States Code, §5871).

A TRUE BILL.

Paul A. Gower

FOREMAN.

David G. Trager

DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

THE COURT: Now the Court is ready to charge you on the law. Mr. Foreman, ladies and gentlemen of the Jury:

We now come to the final state of the proceedings.

The Court will now charge you on the law to be applied to the facts in the case.

As you may recall, I initially gave you a pre-charge as to the manner in which the case would be presented to you. I told you that most of the evidence in the case would come in the form of the testimony of witnesses, and that you were to pay special attention to the manner in which the witnesses testified.

I believe I also instructed you that you would be the judges of the facts in the case, that being your sole province; and that your recollection of the facts

after having heard all of the evidence in the case, the testimony of the witnesses and the documentary proof, was to control the determination of the issues.

Likewise at the time I told you that I would be the judge of the law. This has not changed at this stage of the proceedings. I will not review the facts in this case for you because I am certain that with summations by the attorneys there is no need for the Court to review the facts. In any event, if you find that there is some fact in the case that you may have forgotten or don't recollect, or you can't agree with each other in your deliberations, you can have it read back from the record, and that will, I am sure, refresh your memory.

In any event, I am the judge of the law. You must accept what I say to be the law in this case.

Now, the attorneys have been permitted by the Court and by the rules to make opening statements and summations to you. Under no circumstances are the statements they have made by way of opening or by way of summation to be taken as evidence. However the Court and the law does permit you to take the arguments that they have proffered before you and weigh those arguments. And if you agree with what they have said

on either side of the case you may use those arguments in your deliberations and in discussing the case with each other, and try to convince one another as to what the final determination shall be with reference to the deliberations at hand.

If you feel that the arguments are not commensurate with the testimony and the proof in the case, you may disregard them. The arguments are not evidence. You need not weigh them. However, there are times when the arguments of the attorneys will give you an insight as to something you may have missed, and you may discuss that portion of it if you so desire.

Now, of course, I also said to you that during the trial the Court will be the judge of the law. Likewise, as to motions which at times we had a side bar, as you may recall. That was not for the purpose of keeping any of the proof from you, but were matters of law that were discussed between the attorneys and the Court itself and should not have come before you. In any event, if you feel that you have discovered by some stretch of your imagination what this Court thinks as to either some of the testimony or the case itself, you should remove that from your mind because I told you here and now I have come to no conclusion in this

case nor have I indicated to you in any what whatsoever what my feeling is with reference to the facts in the case or with reference to the guilt or innocence of the defendant. That is your province and your job. You should not try to weigh what you believe the Court's impression may be.

You must understand that the lawyers who appear before you are advocates. They are advocating the best case they can for the parties they represent and they have a right to exercise as much forcefulness as they desire in their questioning or otherwise in presenting their case. I say this because this is within the framework of the ordinary trial.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the indictment and the denial made by the "Not-Guilty" plea of the accused. You are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy, prejudice or bias. Both the accused and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court and reach a just verdict, regardless of the consequences.

During my pre-charge I told you among other things that the questions asked by the attorneys are never to be considered as evidence even though the question may contain a statement of evidence. You are reminded that only the answer to the question is evidence, if, of course, the question was answered.

Of course you know by this time that this case has come before you by way of an indictment presented by a Grand Jury sitting in this Eastern District. The indictment charges the defendant with 3 counts, I shall now read it to you. Remember, the indictment is merely an accusation, merely a piece of paper. It is not evidence and is not proof of anything.

Count 1, on or about and between the 13th day of February and the 4th day of April within the Eastern District of New York, the defendant Jerry Wayne Neal, not at the time being a licensed importer, manufacturer or dealer of firearms or ammunition knowingly and wilfully did engage in the business of dealing in firearms and ammunition. That is under Title 18, United States Code, Section 922 (a) (1) and Title 18, United States Code Section 924 (a).

The defendant is thus accused of violating Section 922 (a) (1) which provides:

It shall be unlawful, (1) for any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of dealing in firearms or ammunition, or in the course of such a business to ship, transport, or receive any firearm or ammunition in interstate or foreign commerce.

In order to convict a defendant of this crime, the Government must prove beyond a reasonable doubt each of the following three elements:

First, that from on or about February 13, 1975 and continuing until April 4, 1975, the defendant engaged in the business of dealing in firearms or ammunition.

Second, that the defendant did not have a Federal Firearms license as an importer, manufacturer or dealer; and

Third, that the defendant acted knowingly and wilfully.

The precise dates are not essential to prove guilt.

As to the first element of the offense, the Government must prove beyond a reasonable doubt that the defendant dealt in firearms or ammunition, without a Federal license. The United States Code defines a

"dealer" very broadly as any person engaged in the business of selling firearms at wholesale or retail. The law defines a dealer in firearms as one who is engaged in a business of selling firearms. The law defines business as that which occupies time, attention and labor for the purpose of livelihood or profit. The defendant must have been shown to have engaged in the business of dealing in firearms or ammunition.

The use of the terms, wholesale or retail, does not necessarily have the connotation of an open business. It can be clandestine and somewhat sporadic. A simple sale or even a few sales would not be enough if the defendant did not plan to continue to obtain guns or gun parts and sell them to appropriate customers. An analogy might be a housewife who regularly supplements her income without her husband's knowledge by selling dresses that she has obtained from a manufacturer she knows to a few neighbors or friends. She would be, in terms of the statute, engaged in the business of dealing in dresses.

It is not possession but engaging in the business of dealing in firearms or ammunition that is the central element of the crime.

The term firearm is defined as, "any weapon, which

will or is designed to or may readily be converted to expel a projectile by means of an explosive." That is under Title 18, United States Code, Section 921 (a) (3) appendix 1202 (c) (3). A hand gun and/or a shotgun would be included in the definition.

Concerning the second element, as I noted, you must find that the defendant did not have a Federal Firearms license as an importer, manufacturer or dealer.

Concerning the third element, the Government must prove that the defendant acted knowingly and wilfully.

An act is done knowingly if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

The purpose of adding the word knowingly was to insure that no one would be convicted for an act done because of mistake or accident or other innocent reason.

An act is wilful if the defendant acts voluntarily with a specific intent to do something the law forbids. That is to say, with the bad purpose either to disobey or disregard the law.

To establish specific intent, the Government must prove that the defendant knowingly did an act which the law forbids, purposely intending to violate the law.

Such intent may be determined from all the facts and circumstances surrounding the case.

Intent is ordinarily difficult to prove directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statement made and act done by a defendant and all other facts and circumstances in evidence which indicate his state of mind. It is ordinarily reasonable to infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

Count 2 involves a different statute from Count 1. Count 2 states:

"On or about the 28th day of February, 1975 within the Eastern District of New York, the defendant Jerry Wayne Neal did wilfully, knowingly and unlawfully possess a firearm as defined in Title 26, United States Code, Section 5845 (a), to wit, a sawed-off shotgun, which firearm was not registered to the defendant Jerry Wayne Neal in the National Firearms Registration and Transfer Record. That is under Title 26, United States Code, Section 5861 (d) and 5871.

The statute says: It shall be unlawful for any person to possess a firearm which is not registered to him in the National Firearms Registration Transfer Record.

In order to convict the defendant in this case of this crime, the Government must prove beyond a reasonable doubt each of the following elements.

The defendant at the time and place charged in the indictment knowingly possessed a shotgun with a barrell less than 18 inches in length; and that the shotgun at the time and place charged was not registered to the defendant in the National Firearms Registration and Transfer Record.

The Government is obligated to establish each of these elements by proof beyond a reasonable doubt. The law never imposes on the defendant in a criminal prosecution the burden of calling any witnesses or of introducing any evidence.

As far as the defendant's knowledge is concerned, the Government is required to prove beyond a reasonable doubt that the defendant knew that he had a shotgun in his possession. Unlike the first count defendant may be found guilty of the second count even if he had no wilful intent to break the law so long as he knowing-

ly possessed the shotgun. In other words he would be guilty of this crime even if he did not know that the shotgun was not registered so long as he knew that he possessed the shotgun and the shotgun was in fact not registered.

The term shotgun means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smoother bore either a number of projectiles or a single projectile for each pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed shotgun shell.

A shotgun would be included in this definition. but a hand gun would not. That means Exhibit 1, would not.

In deciding whether or not defendant possessed the gun you should be aware that the law recognizes two kinds of possession: A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it.

A person who, although not in actual possession, knowingly has both the power and the intention, at a

given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in contructive possession of it.

You must find that the element of possession as that term is used in these instructions is present if you find beyond a reasonable doubt that the defendant had actual or constructive possession.

An act or a failure to act is knowingly done if done voluntarily and intentionally and not because of mistake or accident or other innocent reason.

The Government has produced a certificate of the custodian of the National Firearms Register and Transfer Record to the effect that he has made a diligent search and has found no record of any firearms being registered to the defendant. You may accept this certification as evidence that the shotgun in evidence was not registered to the defendant but you are not obligated to do so. It is up to you to determine what evidence you will accept.

Now I will read the third count.

Count 3: On or about the 28th day of February, 1975, within the Eastern District of New York, the defendant Jerry Wayne Neal did wilfully knowingly and unlawfully possess a firearm as defined in Title 26,

United States Code Section 5845 (a), to wit, a sawed-off shotgun which firearm had the serial number required by Title 26, United States Code, Section 5842 (a) obliterated. That is under Title 26, United States Code 5861 and Title 18 United States Code, Section 5871.

That statute provides that it shall be unlawful for any person to possess a firearm having the serial number required by this chapter obliterated.

Much of what I said about Count 2 applies to Count 3. In order for you to find the defendant guilty of this count the Government must prove beyond a reasonable doubt each of the following two elements:

That the defendant at the time and place charged in the indictment knowingly possessed a shotgun with a barrel less than 18 inches in length, and second that the serial number on this shotgun was obliterated.

As was the case with Count 2, the Government must prove beyond a reasonable doubt that the defendant knew that he possessed a shotgun. The Government must also prove beyond a reasonable doubt that the serial number on the shotgun was in fact obliterated, but it need not prove that the defendant had knowledge that it was obliterated.

The defendant asserts that he was a victim of entrapment as to the crime charged in the indictment.

Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers or their agents to commit a crime, he is a victim of entrapment and the law as a matter of policy forbids his conviction in such a case.

On the other hand, where a person already has the readiness and willingness to break the law, the fact that the Government agent provided what appears to be a favorable opportunity is not entrapment.

For example when the Government suspects that a person is engaged in the illicit sale of narcotics, it is not entrapment for a Government agent to pretend to be someone else and to offer, either directly or through an informer or other decoy, to purchase narcotics from such suspected person. In deciding whether entrapment occurred in this case you must consider the following two questions:

Did the informer and/or agent induce the accused to commit the offense charged in each of the counts;

If so, was the defendant ready and willing without persuasion and was he awaiting any propitious opportunities to commit the offense.

If then the Jury should find beyond a reasonable doubt from the evidence in the case that before anything at all occurred respecting the alleged offense involved in this case, the defendant was ready and willing to commit crimes such as charged in the indictment, whenever opportunity was afforded and that Government officers or their agents did not more than offer the opportunity, then the Jury should find the defendant is not a victim of entrapment.

On the other hand, if the evidence in the case should leave you with a reasonable doubt whether the defendant had the previous intent or purpose to commit any offense of the character here charged, apart from the inducement or persuasion of some officer or agent of the Government, then it is your duty to find him not guilty.

As I have already told you, a hand gun can be the subject of a violation of Count 1 in this indictment, but cannot be the subject of Counts 2 or 3. Therefore in decidi n g whether the defendant was guilty or was not guilty of Count 1 you may consider evidence relating to the Government's Exhibit #1 which is a hand gun. However, you may not consider such evidence in relationship to Counts 2 and 3.

You are entitled to consider evidence relating to Government's Exhibit 1 in determining for purposes of the entrapment defense, whether or not the defendant had a propensity to commit any of the offenses charged.

You may hear me sometimes refer to direct evidence and to circumstantial evidence and it is well to explain now the difference between these two types of evidence.

Direct evidence is where a witness testified to what he saw, heard of observed, what he knows of his own knowledge, something which comes to him by virtue of his senses.

Circumstantial evidence is evidence of facts and circumstances from which one may infer connected facts which reasonably follow the common experience of mankind. Stated somewhat differently, circumstantial evidence is evidence which tends to prove a disputed fact by proof of other facts which have a logical tendency to lead the mind to a conclusion that those facts exist which are sought to be established.

Circumstantial evidence is, if believed, is of no less value than direct evidence for in either case you must be convinced beyond a reasonable doubt of

the guilt of a defendant.

A defendant is presumed innocent of the crime. Thus the defendant, although accused, begins the trial with a clean slate and with no evidence against him and the law permits nothing but legal evidence to be presented before a Jury to be considered in support of any charge against the accused.

So the presumption of innocence alone is sufficient to acquit a defendant unless you, the Jury, are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

It is not required that the Government prove guilt beyond all possible doubt. The test is one of reasonable doubt, a reasonable doubt is a doubt based upon reason and common sense, the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must therefore, be proof of such a convincing character that you would be willing to rely and act upon it unhestitatingly in the most important of your own affairs.

You, the Jury, will remember that the defendant is never to be convicted on mere suspicion or conjecture and the burden is always upon the prosecution to

prove guilt beyond a reasonable doubt. This burden never shifts to a defendant. The law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. If the Jury views the evidence in the case as reasonably permitting either of two conclusions, one of innocence, the other of guilt, you, the Jury, must, of course, adopt the conclusion of innocence.

I have said that the defendant may be proven guilty either by direct or circumstantial evidence. As I have said direct evidence is the testimony of one who asserts actual knowledge, such as an eyewitness. Also circumstantial evidence is proof of a chain of facts and circumstances indicating the guilt or innocence of a defendant. You, the Jury, may make common sense inferences from the proven facts.

It is not necessary that all inferences drawn from the facts in evidence be consistent only with guilt and inconsistent with every reasonable hypothesis of innocence. The test is one of reasonable doubt, and should be based upon all the evidence, the testimony of the witnesses, the documents offered into evidence and the reasonable inferences which can be drawn from the proven facts.

An inference is a deduction or conclusion which reason and common sense leave the Jury to draw from the facts which have been proven. You are to consider only the evidence in this case. But, in your consideration of the evidence you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw, from the facts which you find have been proven, such reasonable inferences as seem justified in the light of your own experiences.

A reasonable doubt may arise not only from the evidence produced, but also from the lack of evidence. Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon the failure of the prosecution to establish such proof.

You as jurors are the sole judges of the credibility of the witnesses and the weight their testimony deserves, and it goes without saying that you should scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness's intelligence, motive and state of mind, and his de-

meanor and manner while on the stand. Consider the witness's ability to observe the matters as to which he has testified, and whether he impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case: the manner in which each witness might be affected by the verdict: and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the Jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection is not an uncommon experience.

In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgement, you will give the testimony of each witness such credibility, if any, as you may think it deserves.

When a defendant in a case of this kind takes the

stand, which he has a perfect right to do, he is subject to all the obligations of witnesses, and his testimony is to be treated like the testimony of any other witness: that is to say, it will be for you to say, remembering the substance of his testimony, the manner in which he gave it, his cross examination, and everything else in this case, whether or not he told the truth. Then, again, it is for you to remember, as you have a perfect right to do so, the very grave interest the defendant has in the case. As he places himself as a witness, he stands like any other witness.

Every witness's testimony must be weighed as to its truthfulness. If you find any witness lied as to any material fact in the case, then the law gives you certain privileges. One of those privileges is that you have the right to disregard the entire testimony of that witness. If you find, however, that you can sift through that testimony and determine which of the testimony is true and which was false, then the law allows you to take the portions which were true and weigh it and disregard those portions which were false. That again is within your prerogative.

The weight of the evidence is not necessarily determined by the number of witnesses testifying on

either side. You should consider all the facts and circumstances in evidence to determine which of the witnesses are worthy of greater credence. You may find that the testimony of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side.

You are not obligated to accept the testimony, even though the testimony is uncontradicted and the witness is not impeached. You may decide, because of the witness's bearing and demeanor, or because of the inherent improbability of his testimony, or for other reasons significant to you, that such testimony is not worthy of belief.

The Government is not required to prove the essential elements of the offenses as defined in these instructions by any particular number of witnesses. The testimony of a single witness may be significant to convince you beyond a reasonable doubt of the existence the essential elements of the offense charged, if you believe beyond a reasonable doubt that the witness is telling the truth.

There is nothing peculiarly different in the way a Jury should consider the evidence in a criminal case, from that in which all reasonable persons treat

any question depending upon evidence presented to them. You are expected to use your good common sense: consider the evidence in the case for only those purposes for which it has been admitted, and give it a reasonable and fair construction, in the light of your common knowledge and the natural tendencies and inclinations of human beings.

If an accused be proven guilty beyond a reasonable doubt say so. If not so proved guilty, say so.

Keep constantly in mind that it would be a violation of your sworn duty to base a verdict of guilty upon anything other than the evidence in the case: and remember as well that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

In making the factual determination on which your verdict will be based, you may consider only the exhibits which have been admitted in evidence and the testimony of the witnesses as you have heard it in this Courtroom.

The punishment provided by law for the offenses charged in the indictment is a matter exclusively within the province of the Court, and should never be considered by the Jury in any way, in arriving at

an impartial verdict as to the guilt or innocence of the accused.

If any references by the Court or by Counsel to matters of evidence does not coincide with your own recollection, it is your recollection which should control during your deliberations.

A separate crime or offense is charged against the defendant in each of the counts of the indictment. Each offense, and the evidence pertaining to it, should be considered separately. The fact that you may find the accused guilty or not guilty of one of the offenses charged should not control your verdict as to any other offense charged. Likewise, a finding of entrapment or not, to one of the offenses charged should not control your verdict as to any other offense charged.

Now, when you have this type of case there must be a unanimous verdict, that means all 12 of you must agree, and it goes without saying that it becomes incumbent upon you to listen to one another and to argue out the points among yourselves in order to determine in good conscience whether your fellow jurors' argument is one commensurate with yours or whether at least you can with good conscience agree with him. You have no right to stubbornly and idly sit by and say,

"I am not talking to anyone," "I am not going to discuss it," because people with common sense and the ability to reason must communicate, they must communicate their thoughts. So, anything which appears in the record and about which one of you may not agree, talk it out amongst yourselves and then if you can't agree as to what is in the record, well, you can ask the Court to have that portion of the testimony read back to you. You may do so by knocking on the door and giving a note in writing to the Clerk who will then present it to the Court and I will then bring you into the Courtroom for the purposes of answering any of your questions that you may have.

The Foreman will preside over your deliberations and will be your spokesman here in Court.

A Jury's verdict must be unanimous, and as you know this means all 12 of you must agree. When all 12 of you have agreed upon a verdict, your verdict should be on the three counts in the indictment. If you should find the defendant innocent of all three counts, you should announce your finding that we the Jury find the defendant not guilty. If you should find the defendant guilty as to one count and not guilty as to any other count, then you would announce your former

verdict as to which of the counts he is guilty and to which of the counts you find him not guilty. That is the Court's charge.

(Whereupon, the following occurred at the side bar.)

MR. CHREIN: Your Honor, there are two points I would like raised. One is partially in the nature of an objection to the Government's summation. But I believe that it can be corrected by your charge.

Mr. Gould implied in his summations that in order to have an entrapment there must be a repeated number of dealings and the defendant must be dragged to and kicking and screaming into the crime. I don't think by that standard the Jury can find a defense of entrapment. If you could say that entrapment by trickery or more subtle means --

MR. GOULD: Your Honor, may I?

THE COURT: Yes.

MR. GOULD: I have a problem with the entrapment charge. I believe that any statement that I made about this man being dragged into it kicking and screaming and Mr. Chrein made the same statement so as long as he didn't --

THE COURT: I think the way to handle this one

is if you feel strongly about it, then I will tell them about any arguments by the attorneys in reference to the method used in apprehending the defendant is not law but merely statements by the lawyers.

(The following statement was made in open Court.)

THE COURT: You must take the law as the Court gives it to you on the question of entrapment.

(The following occurred at the side bar.)

MR. GOULD: Perhaps the Court can say any law is not what the attorneys say --

THE COURT: I already gave them that.

MR. CHREIN: I believe, Your Honor, I have one more.

MR. GOULD: I'm sorry?

MR. CHREIN: As Your Honor will recall we never had a chance to get together on the charge, the additional charge #7 because we had no hiatus between summation and charge. But I do feel even if the Jury feels that while the acts might be relevant for the purposes of establishing the defendant's protensity to commit the act, the Court should instruct the Jury that if the Jury feels that the defendant was induced without the protensity, that if the Jury feels he was induced without protensity to commit the act and he repeated

the crime, that does not have any bearing in and of itself --

THE COURT: I have it right in the beginning of my entrapment charge. It is spelled out in the entrapment charge. An inducement is not ready and willing. It is part of it. It is not sufficient. I read the ready and willing.

MR. CHREIN: I think by the mere fact --

THE COURT: I will tell you what I will do for you. I will tell them what the Court's charge is on inducement and you have to have readiness and willingness to commit the crime and without that he is not guilty.

MR. GOULD: I would object. I don't believe that is what the law is.

THE COURT: It is in the charge.

MR. GOULD: If they find he was induced, assuming they go to ready and willing --

THE COURT: I will charge them this way. I will charge them if you find there is no inducement by the agent for this defendant to commit the crime then of course you will disregard the charge of the indictment if there is inducement by the agent. Meaning you must find he was ready and willing to commit the crime.

MR. GOULD: In addition the burden is on the Government. If he is ready and willing, Your Honor, I will --

THE COURT: I will correct it anyhow.

MR. CHREIN: Inasmuch as we're going to have something additional on entrapment, I would ask the Court if it would repeat the part about commission of a crime that does not specifically rule out entrapment --

MR. GOULD: But you may --

THE COURT: But you may consider it.

(The following took place in open Court.)

THE COURT: There are two additional items that the Court will instruct the Jury at this time.

The first item is that I think if you will recall I said that the arguments and statements of the attorneys, either by way of opening or by way of closing arguments is never to be taken by you as either the law in the case or the facts in evidence. The facts come from the witness stand. The law comes from the Judge. So whatever statements may have been made at the time as to the method that was used in the apprehension of the defendant, either sides argument before you is not controlling as to the law in this case. The Court having charged you on entrapment which you heard in addition to that charge an entrapment which the

Court has already delivered, I wish to add this portion to it. That is if you should find there was no inducement in reference to the defendant to commit the crime, then of course you will disregard the charge of entrapment and you would then go onto the question of being guilty or not guilty. If you should find the defendant, rather that he was induced to commit the crime, then you must also find whether or not he was ready and willing to commit the crime. It is the Government's burden to prove to you that he was ready and willing to commit these crimes, beyond a reasonable doubt as I have charged you.

In addition to that the mere fact there may have been a series of activities by the defendant in the sale of an item in the case, that in and of itself may not be sufficient. However, you may take into consideration the series of activities by the defendant in selling guns as to whether or not he was entrapped in this situation.

That is the Court's charge.

(Whereupon, two Marshalls were sworn.)

REQUEST NO. 7

If you determine from all the evidence beyond every reasonable doubt, that before anything at all occurred respecting the alleged offenses in this case, the defendant was ready and willing to commit crimes such as charged in this indictment, You must still find the defendant not guilty unless you are also satisfied from the evidence beyond a reasonable doubt that the defendant did not obtain the shot gun in question from the informer.

United States v Bueno, 447 F 2d 903 (5th Cir. 1971)

United States v Oquendo, 490 F 2d 161 (5th Cir. 1974)

United States v Gomez Roja, 507 F 2d 1213 (5th Cir. 1975)

United States v Minichiello, 510 F 2d 576 (5th Cir. 1975)

United states v West, 511 F 2d 1083 (3rd Cir. 1975)

Respfectfully submitted,

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CERTIFICATE OF SERVICE

Jan 28, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Phyllis Hoot Santeiger